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Supreme Court, U.S.
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No. __-___

In the
Supreme Court of the United States

Charlie JONES, Warden;
William H. Pryor Jr., Attorney General; and
Donal Campbell, Commissioner,
Department of Corrections, State of Alabama,

Petitioners,

v.

Levi PACE,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. PRYOR JR.
Attorney General

NATHAN A. FORRESTER
Solicitor General
Counsel of Record *

P. DAVID BJURBERG
Assistant Attorney General

JOSEPH G.L. MARSTON
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 353-9782 *

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QUESTIONS PRESENTED

1. Is 28 U.S.C. § 2244(d)(1) — the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for federal habeas corpus petitions filed by state convicts — subject to equitable tolling?

2. If § 2244(d)(1) is subject to equitable tolling, what standards should the courts apply to determine whether to grant equitable tolling?

3. Is attorney neglect a ground for equitable tolling and, if so, under what conditions?

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DECISIONS BELOW

The decision and opinion of the District Court for the Middle District of Alabama is not reported but is transcribed in the appendix to this petition. (App. 30.)

The decision and opinion of the United States Court of Appeals for the Eleventh Circuit also is not reported, except as a table reference, but is transcribed in the appendix to this petition. *Levi Pace v. Charlie E. Jones*, 49 Fed. Appx. 287, 2002 WL 31174135 (11th Cir. 2002) (App. 1).

STATEMENT OF JURISDICTION

On August 22, 2001, the United States District Court for the Middle District of Alabama denied the petition of respondent Levi Pace for a writ of habeas corpus. (App. 30.) On September 17, 2002, the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the district court. (App. 1.) The court of appeals denied rehearing on November 8, 2002. (App. 33.) This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At issue in this case is 28 U.S.C. § 2244(d)(1), the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for a state convict filing a federal habeas petition. The question is whether the limitation period is subject to equitable tolling and, if so, under what conditions:

Section 2244. Finality of determination.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioners Charlie Jones, Warden; William H. Pryor Jr., Attorney General; and Donal Campbell, Commissioner of the Department of Corrections, are all officials of the State of Alabama. Respondent Levi Pace is an inmate in the Alabama correctional system. Petitioners seek review of a decision by the United States Court of Appeals for the Eleventh Circuit, reversing the decision of the United States District Court to dismiss Pace's federal habeas petition as untimely.

The Eleventh Circuit held that the limitation period in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1), should have been equitably tolled from the date the Alabama trial court denied Pace's post-conviction petition for relief until the date the Alabama Court of Criminal Appeals dismissed Pace's appeal as untimely. Pace's counsel had put the notice of appeal in the regular mail five days before it was due, but the notice did not arrive at the clerk's office until a day after the filing deadline. Petitioners submit that this decision by the Eleventh Circuit was incorrect and in conflict with the rulings of other circuit courts on equitable tolling.

1. On June 29, 1993, Pace was convicted of robbery and two counts of murder by the Circuit Court of Chilton County, Alabama. He was sentenced to life in prison. On direct appeal, he raised state law claims only. His convictions and sentences were affirmed by the Court of Criminal Appeals of Alabama on May 6, 1994. *Pace v.* State, 652 So. 2d 321 (Ala. Crim. App. 1994). His convictions became final with the denial of certiorari by the Supreme Court of Alabama on December 22, 1994. *Ex parte Pace*, 652 So. 2d 328 (Ala. 1994).

2. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective. Under Eleventh Circuit precedent, the statute of limitation in AEDPA, 28 U.S.C. § 2244(d)(1), allowed state prisoners whose convictions were already final one year from the effective date of the Act (April 24, 1996) to initiate a federal habeas corpus action to review their convictions.

On October 22, 1996, 180 days after the effective date of AEDPA, Pace filed a state petition for post-conviction relief in the Circuit Court of Chilton County. The petition raised a plethora of constitutional claims touching every aspect of the police investigation, the trial, and the direct appeal. After extensive hearings and argument, the circuit court denied relief on April 8, 1998.

Under Alabama law, appeal is not a continuation of the proceedings below. Rather, "it is the institution of a new statutory proceeding whose object is to reverse the judgment below." *Ohio Cas. Ins. Co. v. Gantt*, 54 So. 2d 595, 598 (Ala. 1951). *See also Finch v. Finch*, 468 So. 2d 151, 153 (Ala. 1985) ("[a]n appeal is a new statutory proceeding in the appellate court"). "[T]he only proper means of filing a notice of appeal from the denial of a post-conviction petition is to file a written notice of appeal in the circuit clerk's office within 42 days from the ruling on the petition." *Wooten v. State*, 769 So. 2d 343, 344 (Ala. Crim. App. 2000). The forty-two day time limit is jurisdictional. The failure to give timely notice of appeal must be noticed by an appellate court, and, when noticed at any point, the appellate court must dismiss the appeal. *Ex parte Woods*, 371 So. 2d 944 (Ala. 1979); *State v. Moore*, 803 So. 2d 584 (Ala. Crim. App. 2001).

Pace therefore had until May 20, 1998, to give notice of appeal. It is undisputed that his counsel mailed the

notice of appeal to the Circuit Clerk from Atlanta, Georgia, by regular mail, on May 15, 1998. Pace's attorneys have never claimed that they made any inquiry of the clerk's office about whether the notice of appeal had arrived. The notice of appeal reached the clerk's office on May 21, 1998, one day late. It was stamped "filed" on that date.

The record on appeal was filed in the Court of Criminal Appeals on November 24, 1998. On February 18, 1999, the State moved to dismiss Pace's appeal on the ground that the notice of appeal was untimely. On March 10, 1999, the Court of Criminal Appeals of Alabama directed the Clerk of the Circuit Court of Chilton County to certify "the actual date that the appellant's notice of appeal was filed in this cause."

The Circuit Clerk certified that his office had received and filed the notice of appeal on May 21, 1998, one day late. Accordingly, on March 26, 1999, the Court of Criminal Appeals dismissed Pace's appeal. "If a notice of appeal is untimely," said the court, "the case is due to be dismissed because we lack jurisdiction."

3. On June 10, 1999, Pace petitioned the Alabama Supreme Court for a writ of certiorari. That petition was still pending on September 2, 1999, when Pace filed this petition for a writ of habeas corpus in the United States District Court, naming various state officials as defendants. On September 24, 1999, the State defendants responded to Pace's federal habeas petition, contending among other things that Pace's petition was untimely, because the AEDPA limitation period had been running ever since the Alabama circuit court had denied Pace's state petition for post-conviction relief and Pace had failed to perfect an appeal.

Pace countered that the Alabama Court of Criminal Appeals had erred in relying on the dating stamp and the clerk's certification to determine when he filed his notice of appeal. Instead, he claimed, the Court of Criminal Appeals should have considered his Docketing Statement form, which was dated May 19, 1998, and which stated that his notice of appeal was filed May 15, 1998. But the Docketing Statement form, which Pace's attorneys were supposed to have prepared and filed with Pace's notice of appeal, had not been mailed from Atlanta until May 20, 1998.

On August 7, 2001, United States Magistrate Judge Vanzetta Penn McPherson issued a report and recommendation (App. 21), in which she found that the time for Pace to file his habeas corpus petition had expired on October 12, 1998 (App. 27). Because Pace did not file his habeas petition until September 2, 1999, Judge McPherson recommended ruling that his petition was time-barred. (App. 27.) On August 22, 2001, United States District Judge Ira DeMent adopted Judge McPherson's recommendation and dismissed the petition. (App. 30.)

4. Subsequently, the United States Court of Appeals for the Eleventh Circuit granted Pace a certificate of appealability as to the following question:

> Did the district court err when it dismissed Pace's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, because it was not filed within the one-year statute of limitations mandated by in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")?

On September 11, 2002, a panel of the Eleventh Circuit answered the question in the affirmative and reversed the district court's judgment. (App. 2.)

The panel rejected Pace's claim that it could review and revise the finding of the Alabama Court of Criminal Appeals that his notice of appeal was not timely. (App. 9-10.) The panel ruled, however, that the AEDPA statute of limitations had been equitably tolled from the date the Court of Criminal Appeals received Pace's untimely notice to the date the Court of Criminal Appeals ordered that Pace's appeal be dismissed. (App. 16-19.) During that time period, the panel held, Pace had reasonably believed that his notice of appeal was timely, because the State had not immediately raised the timeliness objection, and because the Court of Criminal Appeals had taken additional time to gather information from the trial court before determining that Pace's notice was in fact untimely. (App. 17.)

The State defendants applied for rehearing and suggested rehearing en banc. Rehearing was denied on November 8, 2002. (App. 32.)

REASONS FOR GRANTING THE WRIT

This Court has never had the opportunity to address whether the limitation period in AEDPA is subject to equitable tolling. *Duncan v. Walker*, 533 U.S. 167, 181 (2001) (declining to address question); *see also id.* at 183-84 (Stevens, J., concurring) (suggesting that § 2244(d)(1) may be equitably tolled). While most circuit courts have ruled that it is, they have not paid sufficient attention to this Court's directives on how to determine whether a statute of limitation permits equitable tolling. This case presents an excellent opportunity for this Court to resolve the question for AEDPA, once and for all.

Furthermore, assuming that the AEDPA limitation period is subject to equitable tolling, the standard that the Eleventh Circuit employs to determine whether a untimely habeas petitioner should be granted equitable tolling conflicts with the standards of other circuits. In this case, the Eleventh Circuit granted Pace equitable tolling, even though his failure to make a timely notice of appeal in state court was the fault of his own attorneys and nobody else. This decision conflicts with the rulings of numerous other circuit courts that attorney neglect or mistake is not a ground for equitable tolling.

The novelty of these questions, the conflict among the circuit courts on the question of standards and on how to apply those standards to cases of attorney neglect or mistake, and the importance of establishing a uniform national guideline for application of the AEDPA statute of limitation, all warrant certiorari review in this case.

I. Certiorari Is Warranted to Resolve the Question Whether the AEDPA Statute of Limitations Is Subject To Equitable Tolling.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") establishing new limits on federal habeas corpus review of state convictions. Key provisions of AEDPA are the one-year limitation period in 28 U.S.C. § 2244(d)(1), which "quite plainly serves the well-recognized interest in the finality of state court judgments," *Duncan v. Walker*, 533 U.S. 167, 179 (2001), and the companion one-year limitation period in § 2255 for habeas review of federal court judgments. The interest in finality has been emphasized in numerous opinions by this Court. *See Calderon v. Thompson*, 523 U.S. 538, 554-55 (1998) (collecting cases).

As noted, this Court has never had "occasion to address the question" whether § 2244(d)(1) (or § 2255) is subject to equitable tolling. *Duncan*, 533 U.S. at 181. Most of the circuit courts of appeals, including the Eleventh Circuit, have ruled that it is. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Miller v. N.J. Dept. of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *Dunlap v. United States*, 250 F.3d 1001, 1004-07 (6th Cir. 2001) (§ 2255), *followed in Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002) (§ 2244(d)(1)); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287-89 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1997) (en banc); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (§§ 2244(d)(1) & 2255). The First and D.C. Circuits have avoided resolving the question by denying equitable tolling claims on the merits, an approach that equally deprives the statute of limitations of its intended preclusive effect and forces the state or federal government continue litigating equitable tolling in untimely habeas cases. *Lattimore v. Dubois*, 311 F.3d 46, 55 (1st Cir. 2002); *Libby v. Magnusson*, 177 F.3d 43, 38 n. 2 (1st Cir. 1999); *United States v. Saro*, 252 F.3d 449, 453-54 (D.C. Cir. 2001) (§ 2255); *United States v. Cicero*, 214 F.3d 199, 202-05 (D.C. Cir. 2000) (§ 2255). The Seventh Circuit has equivocated, in some cases stating that its availability is "unclear" and finding that equitable tolling would not be appropriate in any event, *Johnson v. McCaughtrey*, 265 F.3d 559, 565-66 (7th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 360 (7th Cir. 2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), in other

cases assuming its availability without much explanation, *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002) (§ 244(d)(1); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (§ 2255).

Most of these courts have rested their rulings on a cursory review of the language and legislative history of AEDPA, which they assert gives indication that Congress did not intend the limitation period in AEDPA to be "jurisdictional." Jurisdictional or not, the limitation period in § 2244(d)(1) is sufficiently detailed and contains precise enough exceptions that the courts should at least have questioned their assumption that Congress would be comfortable with loosening the limitation period even further. The circuit courts have not paid sufficient attention to this Court's precedents prescribing the analysis to employ in determining whether a statute of limitations such as § 2244(d)(1) should be interpreted to include an equitable tolling exception. This case presents this Court with an excellent opportunity to analyze the issue properly and decide once and for all whether equitable tolling should ever be available under AEDPA and whether the States should be put to the considerable expense of litigating the applicability of equitable tolling in case after case after case.

This Court has "repeatedly noted" that 'the starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). In particular, if the statute makes detailed provision for a limitation period, with exceptions that do not include equitable tolling, this Court has held that the statute should be interpreted not to permit equitable tolling. *United States v. Brockamp*, 519 U.S. 347 (1997) (limitation period in Internal Revenue Code § 6511 does not permit equitable tolling).

Section 2244(d)(1) contains detailed rules for determining the filing deadline, with explicit provision for impediments that might prevent a convict from timely filing and for tolling while a convict's state court post-conviction petition is being litigated:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other

> collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1). Under the reasoning of *Brockamp*, the attention to detail and to particular tolling problems that Congress exhibited in enacting § 2244(d)(1) should militate against judicial implication of an equitable tolling exception.

This Court has also stated that the question whether a federal statute of limitations is subject to equitable tolling should be controlled by the question whether equitable tolling would be "consistent with the overall congressional purpose" for the statute. *Honda v. Clark*, 386 U.S. 484, 501 (1967); *Bowen v. City of New York*, 476 U.S. 467, 480 (1986). In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court ruled that equitable tolling did not apply to the Quiet Title Act, because it conflicted with the purpose of the Act to provide certainty and finality to landowners. "It is of special importance that landowners know what their rights are, and the period during which those rights may be subject to challenge." *Id.* at 49.

The recognized purpose of Congress in enacting 28 U.S.C. § 2244(d) was to eliminate "the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 180. Equitable tolling of the statute of limitation is not only inconsistent with this congressional purpose, it undermines it. With equitable tolling available, a state convict can file a habeas corpus petition at any time and claim the right to equitable tolling, forcing the States to expend resources litigating the equitable tolling issue and the federal courts to expend resources adjudicating it,

regardless of the merits of the underlying substantive issues. In passing AEDPA, Congress was trying to promote finality, not create new founts of litigation by convicts.

Furthermore, in AEDPA, Congress addressed the very concerns that animate the equitable tolling doctrine, diminishing if not eliminating the need for judicial interpolation of an implied equitable tolling provision One such concern is that a claim may not be known to a potential claimant until after the statute runs. If, however, the statute of limitation itself provides that the limitation period does not start running until the claim is discovered, that concern is mooted. *Beggerly*, 524 U.S. at 49; *Lampf, Pleva, Lipkind, Purpis & Petigrow v. Gilbertson*, 501 U.S. 350, 363-64, (1991). Congress made provision for belatedly discovered claims in AEDPA. 28 U.S.C. § 2244(d)(1)(D).

The limitation period for filing a federal habeas corpus petition does not begin to run, moreover, until the state court conviction becomes final, which requires a trial and the completion of or waiver of the state appellate process. 28 U.S.C. § 2244(d)(1)(A). Before repairing to federal court, a habeas petitioner must exhaust his state remedies by raising and arguing them on direct appeal or in a state post-conviction petition and an appeal from the denial of relief. It is, therefore, highly unlikely that a potential habeas petitioner would not be aware of a claim before the AEDPA limitation period begins to run.

Congress addressed other tolling concerns in AEDPA as well. As noted above, Congress provided that the limitation period does not begin to run until the direct appeal process is complete, but Congress also provided that the statute of limitations was to be tolled while a proper state post-conviction is pending. 28 U.S.C. §

2244(d)(2). Congress allowed for new developments in the law. 28 U.S.C. § 2244(d)(1)(C). And Congress provided that the limitation period would not begin to run until any "impediment to filing an application" created by illegal state action is removed. 28 U.S.C. § 2244(d)(1)(B).

Finally, in interpreting a statute of limitations, this Court has looked to the burden equitable tolling would have on governmental operations. *Brockamp*, 519 U.S. at 352-53. Making equitable tolling available as an arguable excuse for an untimely filing greatly increases the volume of federal habeas litigation. Counsel have found at least 75 circuit court decisions published just in the last five years, in which the circuit courts have had to address the applicability of equitable tolling to a habeas petition filed under AEDPA. This count does not include unpublished circuit court decisions, let alone district court decisions that go unappealed.

The burden that the federal courts bear from multitudinous prisoner litigation is well recognized. *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992); *Mulazim v. California Dept. of Corrections*, --- U.S. ---, 122 S. Ct. 2645 (2002); *In re McDonald*, 489 U.S. 180, 184 (1989) ("Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources"). To this must be added the burden imposed on the resources of prosecutors, public defenders, and prison systems. The burden is not just the cost of litigation. It is also the cost of retaining and indexing records and files in every criminal case, because some of them may be needed years or decades in the future. Cases that should be summarily dismissed as barred by the statute of limitation may nevertheless require substantial analysis and even evidentiary hearings to determine if the statute should be

equitably tolled. *See, e.g., Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001); *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000); *Griffin v. Rogers*, 308 F.3d 647, 654 (6th Cir. 2002); *Ford v. Hubbard*, 305 F.3d 875, 892 (9th Cir. 2002); *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002); *Hall v. Scott*, 292 F.3d 1264, 1268 (10th Cir. 2002); *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001) (all remanding for district court to give further consideration whether petitioner should be granted equitable tolling).

It was to relieve this burden that most States, including Alabama, have established statutes of limitation for state post-conviction petitions. This same purpose led Congress to establish a statute of limitation for federal habeas corpus petitions. If equitable tolling is added to the protections already provided to habeas corpus petitioners by the statute of limitations itself, the states will be forced to "respond to, and perhaps litigate, large numbers of late [habeas corpus petitions], accompanied by requests for 'equitable tolling.'" *Brockamp*, 519 U.S. at 353. No matter how strict the standard for granting equitable tolling may appear to be, every convict filing an untimely habeas petition will claim that his is the extraordinary case that warrants extraordinary relief. The statute of limitations will be largely diluted of its intended preclusive effect.

In short, the availability of equitable tolling frustrates Congress's purpose in establishing the statute of limitation and imposes tremendous burdens on the States. This Court has not yet had the opportunity to determine whether the statute of limitation on habeas corpus petitions by state (or federal) prisoners is subject

to equitable tolling. This case provides an excellent opportunity to do so.

II. Assuming That the AEDPA Statute of Limitations Is Subject to Equitable Tolling, Certiorari Would Also Be Warranted To Resolve the Conflict Among the Circuits On the Proper Standard for Determining When to Grant Equitable Tolling.

When this Court has found a statute of limitation to be subject to equitable tolling, it has recognized the importance of prescribing objective and consistent standards for determining when equitable tolling is available. As this Court has cautioned, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

In non-AEDPA contexts, this Court has made clear that equitable tolling is to be granted "only sparingly" and according to objective standards. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990). These standards bar the grant of equitable tolling on the basis of "a garden variety claim of excusable neglect." *Id.* This Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* This Court has "generally been

much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.*

On the surface, at least, all the circuit courts have transposed this analysis to the question of equitable tolling under AEDPA. Their AEDPA decisions are replete with boilerplate admonitions that equitable tolling should be granted only "sparingly,' in "rare and exceptional circumstances," in "extraordinary circum-stances beyond a prisoner's control," not for "garden variety claim[s] of excusable neglect." *E.g.*, *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) *Robinson v. Johnson*, 313 F.3d 128, 141-42 (3d Cir. 2002); *Lookingbill v. Cockrell*, 293 F.3d 256, 263-64 (5th Cir. 2002); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Jones v. United States*, 304 F.3d 1035, 1039-40 (11th Cir. 2002) (§ 2255). This superficial agreement masks significant conflict, however, in the standards that the circuit courts use to identify the "rare and exceptional" cases that warrant equitable tolling. It also masks significant disparity in the frequency with which the various circuit courts grant equitable tolling to untimely habeas prisoners. Literally and figuratively, the courts are all over the map and the chief determining factors in whether an untimely habeas petition will survive a motion to dismiss would seem to be the location of the prisoner and the court in which he files.

A. The Second and Eleventh Circuits apply the strictest equitable tolling standard of all the circuits, both on paper and in practice.

In their stated standards, the Second and Eleventh Circuits take the strictest approach to claims of equitable tolling. They require the petitioner to have faced some extraordinary circumstance beyond his control that prevented the timely filing of his petition. They also

require the petitioner to have exercised reasonable diligence to get his petition quickly filed once the impediment was removed. *Smaldone v. Sendowski*, 273 F.3d 133, 138 (2d Cir. 2001) (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)); *Drew v. Dept. of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002).

The instant case notwithstanding, the Eleventh Circuit has rejected most claims for equitable tolling under AEDPA. *Jones v. United States* (2002) (§ 2255); *Drew v. Dept. of Corrections* (2002); *Helton v. Secretary for Dept. of Corrections*, (2001); *Steed v. Head* (2000); *Atkins v. United States* (2000) (§ 2255); *Sandvik v. United States* (1999) (§ 2255); *but see Knight v. Schofield* (2002) (granting equitable tolling).

So has the Second Circuit. *Smaldone v. Sendowski* (2d Cir. 2001); *Hizbullahbank-hamon v. Walker* (2d Cir. 2001); *Warren v. Garvin* (2000); *Geraci v. Senkowski* (2000); *Smith v. McGinnis* (2000); *but see Valverde v. Stinson* (2d Cir. 2000) (remanding for consideration of equitable tolling).

B. The Ninth Circuit applies an equitable tolling standard that is identical on paper to the Second-Eleventh Circuit standard but more liberal in practice.

On paper, the Ninth Circuit applies the same standard to equitable tolling claims under AEDPA as the Second and Eleventh Circuits. "In this circuit, equitable tolling of the filing deadline for a habeas petition is available 'only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.'" *Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002) (quoting *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (quoting *Calderon v United States District Court*

(Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (en banc))). "In addition, '[w]hen external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling may be appropriate.'" *Lott*, 304 F.3d at 923 (quoting *Miles*, 187 F.3d at 1107). The Ninth Circuit has also specified that the "extraordinary circumstances" identified by the petitioner must be both the "but for" and the proximate cause of the petitioner's untimely filing. *Allen v. Lewis*, 255 F.3d 798, 800 (9th Cir. 2001) (per curiam).

In practice, however, the Ninth Circuit grants equitable tolling more frequently than the Second and Eleventh Circuits (or any other circuit, save perhaps the Third). In five published AEDPA cases since 1997, the Ninth Circuit has granted equitable tolling. *Corjasso v. Ayers*, 278 F.3d 874, 877-79 (9th Cir. 2002); *Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Calderon v United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc); *Calderon v United States District Court (Beeler)*, 128 F.3d 530, 541 (9th Cir. 1997), *overruled on other grounds, Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1997) (en banc). In two cases, it has remanded for the district court to reconsider whether equitable tolling might be appropriate. *Ford v. Hubbard*, 305 F.3d 875, 892 (9th Cir. 2002); *Lott v. Mueller*, 304 F.3d 918, 922-25 (9th Cir. 2002). In five, it has denied equitable tolling. *Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002); *Malcom v. Payne*, 281 F.3d 951 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001); *Allen v. Lewis*, 255 F.3d 798 (9th Cir. 2001) (per curiam); *Green v. White*, 223 F.3d 1001 (9th Cir. 2000).

C. The Fourth, Fifth, and Eighth Circuits apply a two-part equitable tolling standard that is slightly more relaxed than the Second-Eleventh Circuit standard.

The Fourth, Fifth, and Eighth Circuits each apply a two-part disjunctive standard to claims of equitable tolling under AEDPA. They recognize two "extraordinary circumstances" that each merit equitable tolling: (1) some sort of interference by the government with the prisoner's attempt to file; (2) any other circumstance beyond the prisoner's control that causes his untimely filing. *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002); *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2001).

This standard appears more relaxed than the Second-Eleventh Circuit standard. It contains no explicit requirement that the prisoner act diligently to file his petition after the impediment to filing is removed. In practical application, however, it is not much different from that of the Second and Eleventh Circuits. Both the Fifth and Eighth Circuits have cited a prisoner's lack of diligence as a basis for rejecting an otherwise worthy equitable tolling claim. *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (even though state court mistakenly waited seven months to mark prisoner's post-conviction petition as filed, prisoner not entitled to equitable tolling during that period because he waited another six months after state court denied petition to file federal habeas petition); *Beery v. Ault*, 312 F.3d 948, 952 (8th Cir. 2002) (even though counsel did not immediately inform prisoner that court had refused to appoint him to represent prisoner, prisoner's six-month delay in checking whether his post-conviction action had been filed and additional four-month delay in filing his post-conviction

application disentitled him to equitable tolling). At best, the Fourth and Fifth Circuits are slightly more liberal than the Second and Eleventh Circuits in granting equitable tolling. *Spencer v. Sutton*, 239 F.3d 626 (4th Cir. 2001); *Minter v. Beck*, 230 F.3d 663 (4th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000); *Roberts v. Cockrell*, —— F.3d ——, 2003 WL 164599 (5th Cir. 2003); *United States v. Riggs*, 314 U.S. 796 (5th Cir. 2002) (§ 2255); *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002); *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002); *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001); *Molo v. Johnson*, 207 F.3d 773 (5th Cir. 2000); *Felder v. Johnson*, 204 F.3d 168 (5th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999); *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999); *Cantu-tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998) (all denying equitable tolling). *But see Rouse v. Lee*, 314 F.3d 698 (4th Cir. 2003) (granting equitable tolling for first-time habeas petition by death row inmate); *Alexander v. Cockrell*, 294 F.3d 626 (5th Cir. 2002) (granting equitable tolling); *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002) (granting equitable tolling for first-time habeas petition) (§ 2255); *United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000) (granting equitable tolling) (§ 2255); *Phillips v. Donnelly* (5th Cir. 2000) (remanding for consideration of equitable tolling). Counsel are not aware of any case in which the Eighth Circuit has granted equitable tolling. *Beery v. Ault*, 312 F.3d 948 (8th Cir. 2002); *Flanders v. Graves*, 299 F.3d 974 (8th Cir. 2002); *Jihad v. Hvass*, 267 F.3d 803 (8th Cir. 2001); *Gassler v. Bruton*, 255 F.3d 492 (8th Cir. 2001); *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000) (all denying equitable tolling).

D. The Third Circuit applies a three-part AEDPA equitable tolling standard that similar on paper to the Fourth-Fifth-Eighth Circuit standard but more liberal in practice.

The Third Circuit has held that equitable tolling is permissible in three circumstances:

> (1) [if] the defendant has actively misled the plaintiff,
>
> (2) [if] the plaintiff has in some extraordinary way been prevented from asserting his rights, or
>
> (3) [if] the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Johnson u Hendricks, 314 F.3d 159, 162 (3d Cir. 2002) (quoting *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) (quoting *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999))).

The first two circumstances parallel those recognized by the Fourth, Fifth, and Eighth Circuits as bases for equitable tolling. The first circumstance is actually more narrow, requiring the defendant (the government) to have "actively misled" the petitioner. The third circumstance, a timely but misplaced filing, is an additional category but would not seem likely to encompass many more cases.

Nevertheless, the Third Circuit has been more liberal than the Fourth, Fifth, and Eighth Circuits in granting equitable tolling under AEDPA. Since 1998, the Third Circuit has granted equitable tolling in three cases. *Banks v. Horn*, 271 F.3d 527, 534-35 (3d Cir. 2001), *overruled on other grounds*, *Horn v. Banks*, 536 U.S. 266 (2002); *Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir. 2001); *United States v. Miller*, 197 F.3d 644, 652-53 (3d Cir.

1999) (§ 2255). It has remanded for the district court to reconsider equitable tolling in two others. *Nara v. Frank*, 264 F.3d 310, 319-20 (3d Cir. 2001); *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616 (3d Cir. 1998). It has denied equitable tolling in three. *Johnson v. Hendricks*, 314 F.3d 159, 162-63 (3d Cir. 2002); *Robinson v. Johnson*, 313 F.3d 128, 141-43 (3d Cir. 2002); *Jones v. Morton*, 195 F.3d 153, 159-60 (3d Cir. 1999).

E. The Tenth Circuit blends the standard of Second and Eleventh Circuits with that of the Third Circuit and grants equitable tolling in AEDPA cases with moderate frequency.

Like the Second and Eleventh Circuits, the Tenth Circuit has ruled that the AEDPA statute of limitations is subject to equitable tolling only "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Woodward v. Williams*, 263 F.3d 1135, 1142-43 (10th Cir. 2001) (quoting *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000)).

In addition, like the Third Circuit, the Tenth Circuit has enumerated specific situations in which equitable tolling should be granted:

> Equitable tolling would be appropriate, for example, when a prisoner is actually innocent, when an adversary's conduct — or other uncontrollable circumstances — prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period.

York v. Galetka, 314 F.3d 522, 527 (10th Cir. 2003); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

Using this approach, the Tenth Circuit grants equitable tolling with moderate frequency. In two published AEDPA cases since 2000, it has granted equitable tolling. *York v. Galetka*, 314 F.3d 522, 527 (10th Cir. 2003); *United States v. Kelly*, 235 F.3d 1238, 1242-43 (10th Cir. 2000) (§ 2255). In two, it has remanded for reconsideration of equitable tolling. *Hall v. Scott*, 292 F.3d 1264, 1267-68 (10th Cir. 2002); *Woodward v. Williams*, 263 F.3d 1135, 1142-43 (10th Cir. 2001). In three, it has denied equitable tolling. *Fisher v. Gibson*, 262 F.3d 1135, 1143-45 (10th Cir. 2001); *Moore v. Gibson*, 250 F.3d 1295, 1299 (10th Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

F. The Sixth Circuit applies a unique five-factor balancing test to AEDPA equitable tolling claims.

Finally, the Sixth Circuit has departed from the strict approach taken by the Second and Eleventh Circuits and indeed from the approach of all the other circuits. In *Dunlap v. United States*, a § 2255 case, the Sixth Circuit considered but rejected the proposition that equitable tolling should be granted only in "rare and exceptional circumstances." 250 F.3d 1001, 1008 (6th Cir. 2001). It also considered but rejected the Second-Eleventh Circuit formulation that the AEDPA statute of limitations "may only be tolled where the circumstances are both beyond the petitioner's control and unavoidable even with due diligence." *Id.* at 1008 (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)).

Instead, the Sixth Circuit adopted a five-factor balancing test derived from its non-AEDPA equitable tolling cases:

(1) the petitioner's lack of notice of the filing requirement;

(2) the petitioner's lack of constructive knowledge of the filing requirement;

(3) diligence in pursuing one's rights;

(4) absence of prejudice to the respondent; and

(5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

250 F.3d at 1008. The court reasoned that this test would still ensure that equitable tolling was granted only "sparingly," while giving the district courts a "guidance and circumscribed latitude in judging each case" lacking in the other circuits' standards. *Id.* at 1009. Applying its test, the Sixth Circuit has denied equitable tolling in three AEDPA cases, *id.* at 1010; *Cobas v. Burgess*, 306 F.3d 441, 443-44 (6th Cir. 2002); *Cook v. Stegall*, 295 F.3d 517, 521-22 (6th Cir. 2002), and once remanded for the district court to give the issue further consideration, *Griffin v. Rogers*, 308 F.3d 647, 654 (6th Cir. 2002).

III. Certiorari Is Also Warranted to Resolve the Conflict Among the Circuits on When Attorney Neglect Can Be a Ground for Equitable Tolling.

Alabama allows post-conviction appellants forty-two days to give a simple notice of appeal, a requirement that is well-published and commonly known. Semi-lettered convicts regularly meet this requirement; only rarely are their notices of appeal tardy. After the Alabama trial court denied Pace's post-conviction petition for relief, Pace's counsel took no action for thirty-seven days. Five days before the deadline, they put his notice in the

regular mail. Mail delays are common, yet they never inquired about whether the notice had arrived in time. Their Atlanta offices are only about three hours by freeway from the Chilton County Courthouse, but they did not deliver the notice of appeal to the courthouse by hand.

Pace does not claim that a state official misled him or his counsel or otherwise prevented them from filing his notice of appeal on time. *Compare Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (per curiam) (remanding for district court to consider whether state court's alleged delay in notifying prisoner that it had denied his post-conviction motion warranted equitable tolling). Nor does Pace claim that his lawyers were unaware of or confused about Alabama's 42-day filing requirement. *Compare Smaldone v. Sendowski*, 273 F.3d 133, 138 (2d Cir. 2001) (attorney's mistaken belief that AEDPA's one-year limitation period was reset rather than tolled by pending state court post-conviction petition was not a valid ground for equitable tolling). Rather, Pace claims that it was reasonable for his lawyers to expect that the notice of appeal, which they put in the mail five days before the filing deadline, would arrive at the courthouse on time.

In most circuits, attorney neglect does not justify equitable tolling. The Seventh Circuit has repeatedly rejected attorney neglect as a ground for equitable tolling, *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002), including when an attorney whose father had recently died mistakenly filed a paper just one day late, *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (§ 2255). The Third and Fourth Circuits have likewise rejected attorney neglect as a ground for equitable tolling, except when the case is capital, which this case is not. *Johnson v. Hendricks*, 314 F.3d 159, 163 (3d Cir. 2002);

Fahy v. Horn, 240 F.3d 239, 244-45 (3d Cir. 2001) (capital case); *Rouse v. Lee*, 314 F.3d 698, 704-10 (4th Cir. 2003) (capital case); *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000). And the Fifth and Eighth Circuits have rejected attorney neglect, unless the attorney intentionally misleads the petitioner and the petitioner reasonably relies on the attorney's false statement. *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (§ 2255); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (§ 2255); *Beery v. Ault*, 312 F.3d 948, 951-52 (8th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000).

In the Ninth Circuit, however, Pace might be entitled to equitable tolling. While the Ninth Circuit has rejected routine attorney neglect as a ground for equitable tolling, *Miranda v. Castro*, 292 F.3d 1063, 1066-67 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2002), it has allowed that "there are instances in which an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling applicable." *Ford v. Hubbard*, 305 F.3d 875, 890 (9th Cir. 2002) (remanding for district court to consider whether attorney's alleged failure to transfer record to prisoner was ground for equitable tolling). *See also id.* at 890-91 & nn. 18-19 (collecting other cases that suggest a more relaxed standard for equitable tolling for attorney neglect). In one case, the Ninth Circuit ruled that the petitioner was entitled to equitable tolling because his attorney had moved away while working on his case and had left an unusable work product with his replacement counsel. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds*, *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998).

Ironically, prior to this case, the Eleventh Circuit would have been expected to reject Pace's claim for equitable tolling. The panel in this case ruled that Pace was entitled to equitable tolling because his counsel put the notice of appeal in the regular mail five days before it was due. But the panel in *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999), ruled that the petitioner was not entitled to equitable tolling when his counsel put a document in the mail *six* days before it was due. The panel in this case ruled that Pace was entitled to equitable tolling, even though his counsel never inquired whether the notice of appeal had arrived on time in the state court clerk's office. But the panel in *Drew v. Dep't of Corrections*, 297 F.3d 1278 (11th Cir. 2002), ruled that a pro se inmate was not entitled to equitable tolling when he failed to take steps to ascertain the status of his federal habeas petition. The panel in this case ruled that Pace was entitled to equitable tolling, even though his counsel did not mislead him in any way and did not lack the resources to effectively prosecute his state court post-conviction petition. But the panel in *Helton v. Secretary for Dep't of Corrections*, 259 F.3d. 1310 (11th Cir. 2001), ruled that the district court had erred in applying equitable tolling to the petition of a pro se convict, even though his attorney had misled him about the filing deadline and his prison law library was found inadequate by the district court. Petitioners pointed out these inconsistencies in their application for rehearing in this case, but the Eleventh Circuit nevertheless denied it. The Eleventh Circuit has thus added to the conflict among the circuit courts, though the firmness of its position is unclear.

CONCLUSION

In sum, there is conflict among the circuit courts both on the general standards for equitable tolling and on the specific question of when attorney neglect justifies equitable tolling under AEDPA. This is a case in which the standards truly matter, because the outcome likely would have been different before a different court and perhaps even before a different panel. This case thus presents an excellent opportunity for this Court to resolve the conflict and set uniform national standards. It also presents an excellent opportunity for this Court to determine whether AEDPA should be subject to equitable tolling in the first place.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. PRYOR JR.
Attorney General

P. DAVID BJURBERG
Assistant Attorney General

NATHAN A. FORRESTER
Solicitor General
Counsel of Record *

JOSEPH G.L. MARSTON
Assistant Attorney General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 353-9782 *

February 6, 2003

No. 02-___

In The Supreme Court of the United States

CHARLIE JONES, WARDEN, WILLIAM H. PRYOR, JR., ATTORNEY GENERAL OF ALABAMA, AND DONAL CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

LEVI PACE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[DO NOT PUBLISH]

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ELEVENTH CIRCUIT
SEP 17 2002
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15528

D. C. Docket No. 99-00962 CV-D-N

LEVI PACE, Petitioner-Appellant,

Versus

CHARLIE E. JONES, Warden, WILLIAM H. PRYOR, JR., Attorney General for the State of Alabama, MICHAEL W. HALEY, Commissioner, Alabama Department of Corrections, Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(September 17, 2002)

Before HULL, FAY and GIBSON* Circuit Judges.

HULL, Circuit Judge:

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* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Levi Pace appeals from the district court's denial of his § 2254 petition as time-barred by the one-year statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). After review and oral argument, we reverse because the one-year period was tolled and Pace's § 2254 petition was timely filed.

I. FACTUAL AND PROCEDURAL BACKGROUND

The pivotal facts in this case are largely undisputed.

A. Trial and Direct Appeal

On June 29, 1993, a jury convicted Pace in the Circuit Court of Chilton County, Alabama, of armed robbery and two counts of attempted murder, and he is serving three life sentences. The Alabama Court of Criminal Appeals affirmed his convictions, *Pace v. State*, 652 So.2d 321 (Ala. Crim. App. 1994), and the Alabama Supreme Court denied a writ of certiorari. *Ex pane Pace*, 652 So.2d 328 (Ala. 1994). The Certificate of Judgment issued on December 22, 1994. Because Pace's convictions became final before AEDPA, Pace had a one-year grace period from April 24, 1996 until April 23, 1997 to file his § 2254 petition.

B. State Post-conviction Proceedings

On October 22, 1996, Pace's counsel filed a post-conviction petition for relief in state court, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The parties agree that this Rule 32 petition tolled the one-year limitations period. Thus, 181 days (April 24, 1996 to October 22, 1996) had run on Pace's AEDPA clock before

his Rule 32 petition was filed. Pace then had 184 days left on his AEDPA clock.

The state court denied Pace's Rule 32 petition on April 8, 1998. Under Rule 4(b)(1) of the Alabama Rules of Appellate Procedure, Pace then had 42 days, or until May 20, 1998, to file a Notice of Appeal with the clerk of the state court.[1]

On May 15, 1998, Pace's counsel mailed the Notice of Appeal to the state court by regular mail.[2] Subsequent certifications by that state court indicated that it received Pace's Notice of Appeal on May 19, 1998. For instance, an Amended Notice of Appeal (dated June 4, 1998) and a Certificate of Completion and Transmission of the Record on Appeal (dated September 17, 1998) both stated that the original Notice of Appeal was filed on May 19, 1998, and both contained certifications by the state court's clerk that the information contained therein was accurate. Additionally, when the criminal clerk of that state court and the

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[1] The Alabama Rules of Appellate Procedure govern appeals in post-conviction cases in Alabama. Ala. R. Cr. P. 32.10. Rule 4 of the Alabama Rules of Appellate Procedure provides that "[i]n a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (6 weeks) after pronouncement of the sentence." Ala. R. App. P. 4(b)(1). Rule 3 indicates that, upon receipt of the Notice of Appeal, the clerk of the circuit court is to serve a copy of the Notice of Appeal on, inter alia, the "appropriate appellate court." Ala. R. App. P. 3(a)(2), 3(d)(2).

[2] Rule 25 of the Alabama Rules of Appellate Procedure provides that "[f]iling may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are *received* by the clerk within the time fixed for filing, except that papers shall be deemed filed on the day of mailing *if* certified, registered, or express mail of the United States Postal Service is utilized." Ala. R. App. P. 25(a) (emphasis added).

court reporter requested extensions of time to file the state trial court's record, they both stated that Pace's Notice of Appeal was filed on May 19, 1998. Finally, according to Pace, the Alabama Court of Criminal Appeals' docketing statement states that his Notice of Appeal was filed on May 15, 1998.

The appeal proceeded as though Pace's Notice of Appeal had been timely filed. Pace filed the record, and the State requested that the Alabama Court of Criminal Appeals remand to the trial court for "correction and expansion" of the trial court's order, a request that was denied. In December 1998, Pace filed his opening brief on the merits, and the State then filed its responsive brief.

However, on February 18, 1999 (*nine months* after Pace's May 1998 Notice of Appeal), and after full briefing in the state appellate court, the State moved to dismiss Pace's appeal as untimely, alleging that Pace's Notice of Appeal was filestamped as of May 21, 1998. These nine months (from May 1998 until February 1999) were crucial because Pace had only 184 days left to file his § 2254 petition. If Pace's May 1998 Notice of Appeal did not continue the tolling, the State waited, albeit if unintentionally, until Pace's AEDPA clock had expired before asserting Pace's Notice of Appeal was untimely.

In an order dated March 10, 1999, the Alabama Court of Criminal Appeals noted that the State had alleged that the Notice of Appeal "was filed on May 21, 1998, rather than on May 19, 1998, as was indicated on the Circuit clerk's transmittal of the notice of appeal." That state appellate court thus ordered the state trial court to certify "the actual date that the appellant's notice of appeal was filed in this cause." In a subsequent opinion dated March

26, 1999, the Alabama Court of Criminal Appeals wrote that "Pace's notice of appeal was filed on May 21, 1998, which is 43 days after his petition was denied," and thus it denied Pace's appeal as untimely. *See Pace v. State*, 767 So.2d 413 (Ala. Crim. App. 1999). The Alabama Court of Criminal Appeals denied rehearing on May 28, 1999. *See Pace v. State*, 768 So.2d 1021 (Ala. Crim. App. 1999).

On June 11, 1999, Pace filed a timely petition for writ of certiorari in the Alabama Supreme Court. While that certiorari petition was pending, Pace filed a § 2254 petition in federal district court on September 2, 1999.[3]

C. Section 2254 Petition

Even after Pace filed his § 2254 petition, the State moved to dismiss his § 2254 petition, arguing, inter alia, that Pace had not exhausted his state remedies and his § 2254 petition was "not ripe for federal habeas corpus."

The State alternatively argued that AEDPA's one-year limitations period had expired in October 1998 (approximately six months after the April 1998 decision by the state trial court denying Pace's Rule 32 petition). The federal magistrate judge ordered Pace to show cause why the limitations period had not already run. Pace responded that the Alabama Supreme Court was still considering whether, inter alia, his Notice of Appeal was timely filed, and he requested that the resolution of the § 2254 petition

[3] Pace filed his § 2254 petition apparently out of concern that his AEDPA clock may have begun to run again when (on March 26, 1999) the Alabama Court of Criminal Appeals found that his May 1998 Notice of Appeal was untimely filed.

be held in abeyance. On November 12, 1999, the Alabama Supreme Court denied Pace's certiorari petition without opinion, and, on the same day, the Alabama Court of Criminal Appeals issued a certificate of judgment as to Pace's Rule 32 petition.

In light of these developments and after further briefing, the district court adopted the magistrate judge's recommendation that Pace's untimely Notice of Appeal did not toll AEDPA's limitations period because it had not been "properly filed" on May 21, 1998, in the Alabama Court of Criminal Appeals. As a result, the district court agreed with the State that the one-year limitations period had run in October 1998, and Pace's § 2254 petition, filed on September 2, 1999, was time-barred.

This Court granted Pace's motion for a certificate of appealability ("COA") on one issue: "Did the district court err when it dismissed Pace's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, because it was not filed within the one-year statute of limitations mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")?"

II. DISCUSSION

A. AEDPA's Limitations Period

AEDPA sets a one-year period of limitations for filing a § 2254 petition, which begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). For prisoners such as Pace, whose convictions became final before the effective date of AEDPA, this Court has adopted a one-year grace period and held that the one-year limitations period begins

running from AEDPA's effective date of April 24, 1996. *Webster v. Moore*, 199 F.3d 1256, 1257 n.3 (11th Cir. 2000) (citing *Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209, 1211 n.4 (11th Cir. 1998)).

The parties do not dispute that AEDPA's one-year limitations period began to run on April 24, 1996, that Pace filed his § 2254 petition on September 2, 1999, and that Pace's § 2254 petition is time-barred in the absence of tolling.[4] Thus, we focus on the tolling issues in this case.

B. Tolling From Under AEDPA

AEDPA provides certain limited circumstances under which its one-year limitations period may be tolled. Specifically, § 2244(d)(2) states, "[t]he time during which a properly filed application for State post-conviction review or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). There is also no dispute that Pace's Rule 32 petition in state court was "a properly filed application for State post-conviction . . . " which tolled AEDPA's limitations period.

See 28 U.S.C. § 2244(d)(2).[5]

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[4] We review de novo the district court's dismissal of Pace's § 2254 petition as timebarred. *WXzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1215 (11th Cir. 2000).

[5] Substantial case law exists concerning the meaning of a "properly filed application" under § 2244(d)(2). See *Artuz v. Bennett*, 531 U.S. 4 (2000); *Drew v. Dep't of Corr.*, 297 F.3d 1278 (11th Cir. 2002); *Delancy v. Fla. Dep't of Corr.*, 246 F.3d 1328, 1330-31 (11th Cir. 2001); *Hurley v.*

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Thus, Pace's AEDPA clock ran for 181 days from AEDPA's effective date on April 24, 1996 to October 22, 1996, when Pace filed his Rule 32 petition. Pace's AEDPA clock then stopped on October 22, 1996, and Pace had 184 days left to file his § 2254 petition once that clock started again. All parties also agree that Pace's AEDPA clock did not start for at least another year and a half from October 22, 1996, to April 8, 1998, which was the time during which the state court considered Pace's Rule 32 petition.

In addition, when the state court denied Pace's Rule 32 petition on April 8, 1998, the AEDPA clock did not start. Pace's state petition was still "pending" during the available 42-day period (ending May 20, 1998) during which he could file a timely notice of appeal of the denial of his Rule

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Moore, 233 F.3d 1295, 1298 (11th Cir. 2000); *Webster v. Moore*, 199 F.3d at 1258-59 (11th Cir. 2000). However, as stated in our COA and contrary to the State's suggestion in this appeal, the holdings of these cases are distinct from this different issue in Pace's appeal: whether, after a properly filed application is rejected, an untimely filed Notice of Appeal seeking review of that dismissal keeps that properly filed application "pending" so as to continue to toll the AEDPA clock. See, for example, *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000) (stating that after properly filed application was submitted, "[T]he question is at what point after the [trial court's] decision did the appeal cease to be pending"); *Hizbullahankhamon v. Walker*, 255 F.3d 65, 70 (2d Cir. 2001) ("Once a court determines that the initial application was 'properly filed,' the 'properly filed' inquiry comes to an end; the only remaining question is when further appellate review of the initial application becomes unavailable.")

Pace argues that the criteria for evaluating a "properly pending" application (such as time, form, filing fees, etc.) are not necessarily applicable to the evaluation of a "pending" case on appeal. He submits that to conclude otherwise, we would need to read the words "pending" as the phrase " properly pending," which is not in the version of § 2244(d)(2) passed by Congress

32 petition. *See* Ala. R. App. P. 4. Numerous courts have correctly held that this time-to-appeal period does not count against the AEDPA clock. *See*, for example, *Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001) (holding that "§2244(d)(2) tolls the entire period allotted for timely state appellate review"); *Gibson v. Klingeer*, 232 F.3d 799, 803-04 (10th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417, 424 (3d Cir. 2000) ("'pending' must include the time during which an appeal could be filed even if the appeal is not eventually filed"); *Mills v. Norris*, 187 F.3d 881, 884 (8th Cir. 1999). In summary, it is clear Pace's AEDPA clock was tolled from the filing of his Rule 32 petition on October 22, 1996, until at least May 20, 1998, when his time for appeal expired.[6]

C. Tolling of AEDPA Clock Stopped for One Day

It is also clear that the tolling of Pace's AEDPA clock stopped on May 20, 1998. The Alabama Court of Criminal Appeals found that Pace's Notice of Appeal was not filed by the May 20, 1998 deadline, but was filed on May 21, 1998, one day late. Under AEDPA, we must defer to the factual findings of that state court.[7] *See* 28 U.S.C. §§ 2254(d)(2),

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[6] The order granting the COA stated that AEDPA's limitations period began to run again on April 8, 1998, when the Rule 32 petition was denied. But AEDPA's limitations period actually begins to run when the time for appealing the state court decision has expired, which in this case was May 20, 1998.

[7] Pace argues that the Alabama Court of Criminal Appeals should have conducted an evidentiary hearing concerning the timeliness of Pace's Notice of Appeal and that the record offers "clear and convincing evidence" that its factual finding of untimeliness is not entitled to deference under AEDPA. 28 U.S.C. § 2254(e)(1). We note that there was evidence to support that contested factual finding – namely, the

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2254(e)(1). As of May 20, 1998, Pace's state court proceedings were complete and there was no longer a "pending" state post-conviction petition in play. Even if an appeal can be later resuscitated, that does not mean it was "pending" in the interim.

Other circuits uniformly have recognized this period – between the statutory notice of appeal deadline and the filing of an untimely appeal – as starting the AEDPA clock to run.[8] This often dooms § 2254 petitioners who wait a very long time to file an untimely notice of appeal. But Pace was only one day late, and, thus, he still had 183 days left on his AEDPA clock when his untimely notice of appeal was filed on May 21, 1998.

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file-stamped version of Pace's Notice of Appeal – even if file-stamped copies do not prove when a paper was received. *See* Ala. R. App. P. 25(a) (referring to when "papers are received" not "stamped"). However, it is not essential to resolve this issue since, even assuming Pace cannot overcome AEDPA's strong presumption of deference to state courts' factual findings, we find in Pace's favor nonetheless.

[8] See, for example, *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001) (disallowing tolling between time of appeals deadline and ultimate filing of notice of appeal); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) ("At the point when the state limitations period expired, a petitioner is not entitled to further appellate review and, therefore, he has no application 'pending' in state court."); *Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (noting that subsequent rulings on untimely petition "cannot erase the time period during which nothing was pending before a state court"); *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000) ("it is not sensible to say that the petition continues to be 'pending' after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was 'pending' in the interim.").

D. Impact of Untimely Notice of Appeal

Thus, our next inquiry becomes the impact of Pace's untimely notice of appeal and whether it stopped the AEDPA clock again. As we stated in our COA, "whether an untimely filed notice of appeal in state court tolls the statute of limitations" under § 2244(d)(2) is an issue of first impression in this circuit.[9]

Several circuits have confronted the impact under § 2244(d)(2) of an untimely filed notice of appeal in state court. These cases arose in a variety of state procedural systems, but the majority considered untimely filed notices of appeal, or their equivalents, to be "pending" and thus toll the AEDPA limitations period if it was possible for the state appellate court to consider an untimely notice of

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[9] Whether the appeal was "pending" under § 2244(d)(2) – is a matter of federal statutory law. Thus, we must resolve de novo whether, and on what date, there ceased to be a "properly filed application for State post-conviction or other collateral review . . . pending" that would toll AEDPA's clock. 28 U.S.C. § 2244(d)(2).

In other contexts, we have stated that "an application 'for State post-conviction or other collateral review . . . is pending' [for purposes of § 2244(d)(2)] only so long as the case is in the state courts." *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000) (citations omitted) (emphasis added). And we have observed that, under Florida law, "a state court of appeals' order denying a rehearing on its affirmance of the state trial court's denial of a motion for post-conviction relief is pending [for purposes of § 2244(d)(2)] until the mandate issues." *Nvland* [sic] *v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (emphasis added). Although these statements can be read to support Pace's position, both were dicta as to the narrow issue here regarding the impact of an untimely notice of appeal at the intermediate state appellate court. *Coates* examined whether § 2244(d)(2) tolled the AEDPA clock while a United States Supreme Court certiorari petition could be filed. *Nvland* [sic] analyzed whether § 2244(d)(2) tolled the AEDPA clock between the time an intermediate state appellate court had ruled and the mandate issued.

appeal. *See Allen v. Mitchell*, 276 F.3d at 185 (stating that "plain language of § 2244(d)(2) requires tolling during the [period in which an untimely appellate petition is under review by the state court] if the appellate petition was 'properly filed'") (emphasis added); *Melancon*, 259 F.3d at 407 ("after the appeal period has lapsed, an application ceases to be pending but a subsequently filed application entitles the petitioner to additional tolling beginning at the time of the 'proper' filing" though untimely); *Gibson*, 232 F.3d at 806-07 (permitting tolling while petitioner was "properly employing 'state court procedures' in attempting to exhaust state court remedies"); *Fernandez v. Sternes*, 227 F.3d 977, 979 (7th Cir. 2000) (concluding that "the right period of exclusion is all time between the filing of the request to excuse the default and the state court's decision on the merits (if it elects to excuse the default)"). *Compare Williams v. Cain*, 217 F.3d 303, 31011 (5th Cir. 2000) (finding that state appellate rules "expressly prohibit[ ] any extension" of deadline for appeal and that once petitioner failed to comply with that deadline, "further appellate review was unavailable" and his application "ceased to be pending") (quotation and citation omitted).

In addition to these circuit decisions, the Supreme Court's recent decision in *Carey v. Saffold*,122 S. Ct. 2134 (2002), interpreting § 2244(d)(2) also may help Pace. In Carey, the Supreme Court observed the following about the "ordinary meaning" of the word "pending":

> The dictionary defines "pending" (when used as an adjective) as "in continuance" or "not yet decided." Webster's Third New International Dictionary 1669 (1993). It similarly defines the term (when used as a preposition) as "through the period of continuance ... of," "until the ...

> completion of." Id. That definition, applied in the present context, means that an application is pending as long as the ordinary state collateral review process is "in continuance" – i.e., "until the completion of that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains "pending."

___ U.S. ___, 122 S. Ct. at 2138.[10] Under *Carey*, a post-conviction proceeding is "pending" if it is "not yet decided" or until "final resolution."[11]

Thus, these circuit decisions, in conjunction with Carey's definition of "pending," arguably support Pace's position. Once Pace filed his Notice of Appeal on May 21, 1998, there was again, according to Pace, a "pending" proceeding for state post-conviction relief. The Alabama Court of Criminal Appeals then had the power to rule on

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[10]In *Carey*, the issue was whether a state post-conviction motion is "pending" between the initial state court decision and the filing of a timely notice of appeal to a higher state court. U.S. at ___, 122 S. Ct. at 2135-36 (involving California's "unique collateral review system" that does not involve a notice of appeal, but rather "the filing (within a 'reasonable' time) of a further original state habeas petition in a higher court"). It concluded that such time did toll AEDPA's limitations period. Id.

[11] "Under Alabama law, an appeal to the Alabama Court of Criminal Appeals is not final until a certificate of judgment issues. *See Ex parte State*, 566 So.2d 758 (Ala. 1990); *see also* Ala. R. App. 41 (b) (staying certificate's issuance pending resolution of certiorari petition to Alabama Supreme Court). And the appeal of cases to that court divests the trial court of jurisdiction to enforce any part of its order. *See, for example*, *Gordon v. State*, 710 So.2d 943 (Ala. Crim. App. 1998). Pace's Notice of Appeal unquestionably constituted an appeal – albeit untimely – that awaited resolution before the Alabama Court of Criminal Appeals, and thus prevented issuance of such a certificate of judgment.

Pace's filing. And, until it did so and a certificate of judgment issued, Pace's case arguably was "pending." According to Pace, this is all § 2244(d)(2) requires; it does not require his properly filed application to remain "properly pending" under state law.[12] Under this theory, Pace's AEDPA clock would have run for only one day after May 20, 1998, before it stopped again.

The problem with Pace's theory, however, is that it is not clear whether the Alabama appellate courts actually may consider an untimely notice of appeal such as the one filed in this case. The State argues that untimely appeals are simply unrecognizable by an appellate court under Alabama law. *See* Ala. R. App. P. 4; *McKane v. Durston*, 153 U.S. 684, 688 (1894) ("[W]hether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself."). The State submits that Alabama appellate courts have no jurisdiction to proceed with an untimely appeal. *See Rogers v. Singleton*, 237 So.2d 473, 474 (1970) ("An appeal must be taken in the manner prescribed by statute . . . otherwise there is no appeal.").[13]

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[12] Dicta in *Artuz v. Bennett*, 531 U.S. 4 (2000), also may help Pace's position. In *Artuz*, while considering whether an *initial* petition was "properly filed," the Supreme Court hypothesized that improper filings could still be "pending": if an initial application "is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be *pending*, but not properly filed." 531 U.S. at 9 (emphasis in original). Applying this interpretation (which was arguably amplified in Carey) here, Pace's notice of appeal arguably could be seen to be "pending" despite its untimeliness.

[13] Even if we give due deference to the Alabama courts' interpretation of Alabama law, the issue before this Court is arguably not whether a properly filed appeal that in hindsight had a perfect jurisdictional

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Pace responds that while Alabama law does not expressly recognize the acceptance of untimely received appeals (except in the case of the pro se prison mailbox rule not applicable here), neither does it *forbid* their acceptance. *See Fountain v. State*, 2000 WL 572753 (Ala. Crim. App. Apr. 28, 2000). Thus, Pace asserts, Alabama appellate courts have said they can permit untimely post-conviction appeals to proceed due to the fault of court personnel. *See*, for example, *Ex parte Johnson*, 806 So.2d 1195 (Ala. 2001); *Brooks v. State*, 2002 WL 732117 (Ala. Crim. App. Apr. 26, 2002); *Fountain*, 2000 WL 572753.[14]

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basis was filed, but whether there was a matter "pending" – whether properly or improperly – as that phrase is used in AEDPA. Pace argues in his Reply Brief that one of the "Alabama appellate courts could have chosen to review the case on the merits if they found that the Notice [of Appeal] was untimely filed due to an error made by the Chilton County Circuit Clerk" – a not-so-implausible argument given the evidence in the record.

[14] Pace's contention arguably is buttressed by the fact that the Alabama appellate courts issued opinions analyzing their jurisdiction and concluding they had no jurisdiction to review Pace's untimely appeals. These courts had jurisdiction to determine their jurisdiction, meaning that there was arguably a "pending" case for them to resolve their jurisdiction. If Pace's appeal was not "pending" prior to these decisions, what are we to make of these state court proceedings that did not end until a certificate of judgment was issued in November 1999? Was Pace's case both "pending" in the state courts until they retroactively said they had never had jurisdiction, but "not pending" during that time for AEDPA? Would this be inconsistent? As the Supreme Court stated in Artuz when it criticized arguments that a petition might be capable of being both "properly filed" and "improperly filed," such theories may lead to "verbal gymnastics." 531 U.S. at 10. See also Mills v. Norris, 187 F.3d 881, 883 (8th Cir. 1999) (observing that an appellate court's "willingness to rule on [a] motion to dismiss suggests that a valid appeal was in fact commenced").

In traveling down this statutory tolling road first, we have ended up confronting a fairly difficult issue of Alabama appellate procedure that affects our analysis of the tolling available under § 2244(d)(1). However, we find it unnecessary to resolve this issue because Pace has established an alternative ground for tolling during the time period between May 21, 1998, and March 26, 1999, that makes Pace's § 2254 petition timely filed in any event. Thus, we pursue that alternative route now.

E. Equitable Tolling

Under AEDPA, equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *See, e.g, Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999); *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312-13 (11th Cir. 2001). The "extraordinary circumstances" standard applied in this circuit focuses on the circumstances surrounding the late filing of the habeas petition, rather than the circumstances surrounding the underlying conviction.[15]" *See Sandvik*, 177 F.3d at 1270-72; *Helton*, 259 F.3d at 1314-1315.

The federal law is clear that a state prisoner, such as Pace, should not file his federal habeas petition until he has exhausted his state remedies. 28 U.S.C. § 2254(b)-(c). Therefore Pace had every reason to delay filing his federal habeas petition until his pending appeal of the denial of

[15] We review the issue of equitable tolling de novo, as the question is "solely one of law." *Sandvik v. United States*, 177 F.3d at 1271; *Helton*, 259 F. 3d at 1312 (quoting Sandvik).

his state post-conviction petition was final in the state appellate courts. Moreover, what makes this case unique is that Pace also had every reason to believe that his state appeal was indeed timely filed and continued the statutory tolling of the AEDPA clock. We say this because of the confluence of the following factual circumstances in this case: (1) numerous court-issued documents certified that Pace's state appeal had been submitted in a timely manner, (2) the parties completed the appellate briefing on the merits, (3) the State did not raise any timeliness issue for nine months, which was after full briefing and after Pace's AEDPA time would have expired without the tolling during the pendency of the appeal, (4) when the State eventually raised the timeliness issue in February 1999 (apparently upon belated discovery of the single file-stamped document contradicting the numerous certifications of timeliness), the state appellate court even then requested additional information from the Chilton County Circuit Clerk in order to be able to evaluate that disputed factual issue, and, (5) even as late as September 1999, the State recognized Pace's post-conviction petition was still "pending" in the state appellate courts because the State argued to the federal district court that Pace's § 2254 petition, filed on September 2, 1999, should be dismissed as unripe for failure to exhaust state court remedies. *See* 28 U.S.C. § 2254(b)(1)(A).

Thus, while we defer to the state appellate courts' fact-findings that Pace's Notice of Appeal was not timely filed, the AEDPA limitations period was, nonetheless, equitably tolled from May 21, 1998, to at least March 26, 1999, when the Alabama Court of Criminal Appeals dismissed Pace's appeal as untimely. We also find Pace acted with due diligence and that the circumstances here,

such as the numerous mis-certified court documents, and the State's belatedly raising the issue until his AEDPA time expired, were beyond his control. It does not comport with AEDPA's language and purpose to force a prisoner in Pace's unique factual situation to prematurely file in federal court. Here, as the Alabama trial and appellate courts' considerable confusion over the date of Pace's notice of appeal shows, a genuine factual issue concerning his Notice of Appeal needed to be resolved by the state courts prior to the federal courts' consideration of Pace's claims. *See Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002).[16]

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[16] Equitable tolling in this case also serves the purposes Congress intended in AEDPA. Section 2244's limitations period "'serves the well-recognized interest in the finality of state court judgments' and 'reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.'" *Drew v. Dep't of Corr.*, 297 F.3d 1278 (11th Cir. 2002) (quoting *Duncan v. Walker*, 533 U.S. 167 (2001)). State prisoners are not encouraged to file defensive, yet wasteful, § 2254 petitions simply to safeguard against mis-certified court documents and the State's claiming some nine months later that a notice of appeal was one day late. *See Carey*, 122 S. Ct. at 2138 (emphasizing that insisting on exhaustion of state court remedies before state prisoners seek § 2254 review "serves AEDPA's goal of promoting comity, finality, and federalism") (quotation and citation omitted); *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001) (recognizing "part of the congressional rationale in passing AEDPA stemmed from a desire to require habeas petitioners to exhaust their claims in state courts," and if such petitioners do not receive tolling for state court motions and are "unable to predict whether [state courts] would apply the literal language of [state procedural requirements], many would bypass possible state court consideration of their claims and move directly to federal court" too soon); *Mills*, 187 F.3d at 884 (stating importance of "harmonizing" § 2244(d)(2)'s directive with AEDPA's exhaustion requirement because it furthers the "principles of comity" and "lightens the dockets of federal

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Pace filed his § 2254 petition on September 2, 1999, and thus an additional 160 days did run on Pace's AEDPA clock from March 26, 1999 to September 2, 1999. Nonetheless, as of September 2, 1999, Pace's AEDPA clock had run for a total of only 342 days, consisting of: the 181 days from April 24, 1996 to October 22, 1996; the one day on May 21, 1998; and the 160 days from March 26, 1999 to September 2, 1999. Thus, Pace's § 2254 petition was timely filed on September 2, 1999. This conclusion does not mean that Pace's § 2254 petition will necessarily be successful, but it is not time-barred."[17]

---

courts by avoiding the need for state prisoners to file protective federal petitions before uncertain state appellate procedures have been exhausted").

[17] We also do not suggest that state prisoners may toll AEDPA's statute of limitations by filing plainly tardy or incomplete notices of appeal in hopes of prolonging the period in which to file a § 2254 petition. See *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999) (noting that "Congress could not have intended that the time for filing the federal action be tolled indefinitely" and referring to the possibility of prisoners filing repeated initial applications for leave to file state post-conviction proceedings). In fact, because the AEDPA clock runs between the time of the appeal deadline and an untimely notice of appeal, petitioners who file untimely notices of appeal may find their limitations period has already expired. *See Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that state post-conviction motion filed more than 12 months into AEDPA period did not toll AEDPA clock because "there is no period remaining to be tolled") (quoting *Webster v. Moore*, 199 F.3d 1256, 1269 (11th Cir. 2000)).

And, when there is no confusion as to the date on which the notice of appeal was filed, it usually is dismissed summarily either upon the State's motion or sua sponte review by the relevant court so as to continue the AEDPA clock's running. See *Emerson*, 243 F.3d at 935 (concluding that suggestion for reconsideration filed with trial court tolls AEDPA clock "during the period in which a Texas habeas petitioner *has filed* such a motion. The tolling only lasts as long as the Texas

(Continued on following page)

III. CONCLUSION

For these reasons, we conclude that the unusual factual circumstances in this case meet the extraordinary requirements of Sandvik and Helton, so that Pace was entitled to have AEDPA's clock equitably tolled at least from May 21, 1998 until March 26, 1999.[18] As a result, Pace's § 2254 petition, filed on September 2, 1999, was timely filed. Thus, we vacate the district court's denial of Pace's § 2254 petition and remand this case for further proceedings.

REVERSED, VACATED, AND REMANDED.

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courts take to resolve the motion or suggestion for reconsideration. . . . [T]he Texas courts have the ability to alleviate the State's concerns [about indefinite tolling attempts] by sanctioning petitioners who abuse the judicial process.") (emphasis in original). Pace's case [sic] unusual in that his notice of appeal was only one day late, he still had a lot of time left on his AEDPA clock, and the State did not raise the timeliness issue for nine months or until his AEDPA clock had expired.

[18] The argument is made that equitable tolling continued until the Alabama Supreme Court ruled on November 12, 1999, and a final judgment was issued was issued by the Alabama Court of Criminal Appeals, also on November 12, 1999. Indeed, even after the March 26, 1999, dismissal of Pace's appeal by the Alabama Court of Criminal Appeals, the State still took the position in federal court that Pace had not yet exhausted his state remedies and that Pace's § 2254 petition was premature. But tolling through March 26, 1999, makes Pace's § 2254 petition timely filed and, thus, we need not reach this final issue.

APPENDIX B

[FILED AUG 7, 2001
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LEVI PACE,	)	
PETITIONER,	)	
V.	)	CIVIL ACTION NO. 99-D-962-N
MICHAEL HALEY,	)	
RESPONDENT	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

This cause is before the court on a 28 U.S. C. § 2254 petition for habeas corpus filed on September 2, 1999. In this petition, the petitioner challenges convictions for first degree robbery and two counts of attempted murder entered against him by the Circuit Court of Chilton County, Alabama on June 28, 1993 and made final on direct appeal on March 22, 1995. For each conviction, the petitioner was sentenced to life imprisonment. Pursuant to the orders of this court, the respondents filed an answer in which they argue that the habeas petition is barred by the one-year limitations period applicable to 28 U.S.C. 2244(d)(1), as it was not filed within the one-year "grace

period" allowed by law in this Circuit.[1] Specifically, the respondents assert that because Pace's conviction became final in 1995, before the effective date of the statute of limitations, he was allowed a year from enactment of the AEDPA, less the time that any properly filed state post-conviction petition was pending, to file a § 2254 petition.

In light of the foregoing, the court entered an order allowing the petitioner an opportunity to shove [sic] cause why this petition should not be barred from review by this court. Specifically, the petitioner was advised that he failed to file the petition within the one-year limitation period established by 28 U.S.C. § 2241(4)(1). In his response, the petitioner asserts that his appeal of the denial of his Rule 32 petition to the Alabama Court of Criminal Appeals tolled the limitations period.

Upon review of the pleadings filed in this case and the well settled law of this Circuit, the court concludes that the petition for writ of habeas corpus is due to be denied as it was not filed in accordance with the provisions of 28 U.S.C. § 2241(4)(1).

---

[1] Upon enactment of the AEDPA, this court adopted a "grace period" allowing prisoners whose convictions became final prior to the effective date of the AEDPA a reasonable time after enactment of the one-year period of limitation to file their § 2254 petitions. A reasonable time is until April 23, 1997 – "one year from the AEDPA's effective date." *Wilcox v. Florida* Department of Corrections, 158 F. 3d 1209, 1211 (11th Cir. 1998).

DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act of 1996 was signed into law on April 24, 1996 and amended the habeas corpus statute to include a one-year period of limitations on petitions filed pursuant to 28 U.S.C. § 2254. This limitation period is codified at 28 U.S. C. § 2244(4) and provides that:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

> counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)(A) directs that the limitation period for filing a 28 U.S.C. § 2254 petition begins to run on the date when the time for seeking direct review of the challenged judgments expired. The statute of limitations is tolled during the ninety-day period in which the petitioner could have filed a certiorari petition in the United States Supreme Court. *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000) ("A judgment does not become 'final by the conclusion of direct review or by the expiration of the time for seeking such review,' *see* 28 U.S.C. § 2244(d)(1)(A), until the Supreme Court has had an opportunity to review the case or the time for seeking review has expired"). Thus, a state court judgment of conviction becomes final under 28 U.S.C. § 2244 when the Supreme Court denies certiorari or the time to apply for certiorari expires. Id.

The petitioner was convicted of first-degree robbery and two counts of attempted murder on June 28, 1993. Pace filed a direct appeal and his convictions were affirmed by the Alabama Court of Criminal Appeals on May 6, 1994. The Alabama Supreme Court denied the petitioner's application for a writ of certiorari on December 22, 1994, and the certificate of judgment was issued on this date. Thus, the court concludes that the petitioner's convictions for robbery and attempted murder became final on March 22, 1995, ninety (90) days from the Alabama Supreme Court's denial of certiorari, as this is the date on which his time for filing an application for a writ of certiorari in the United States Supreme Court expired.

In light of the foregoing, it is clear that the petitioner's conviction became final prior to enactment of the AEDPA.

If the AEDPA were applied retroactively, the one-year limitation period contained in section 2244(d)(1)(A) would have expired in 1996. However, the Eleventh Circuit has held that "application of the one-year time bar in 28 U.S.C. § 2244(d) to petitions of prisoners, like [Pace], whose convictions became final long prior to the effective date of the AEDPA . . . 'would be unfair, and impermissibly retroactive.' [*Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998)]." *Wilcox v. Florida Department of Corrections*, 158 F.3d 1209, 1211 (11th Cir. 1998). The Court further held that prisoners in this position must be allowed a reasonable period of time after enactment of § 2244(d)'s one-year period of limitation to file their § 2254 petitions, and determined that "a reasonable time" is until April 23, 1997 – "one year from the AEDPA's effective date." *Id.* Moreover, several courts have permitted a tolling of the one-year grace period where equity warranted such a result, *see Miller v. New Jersey State Dep't. of Corrections,* 145 F.3d 616, 617 (3d Cir. 1998); *Calderon v. U.S. District Court for the Central District of California*, 128 F.3d 1283, 1289 (9th Cir. 1997), and a panel of the Eleventh Circuit agrees that "[e]quitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). Additionally, 28 U.S.C. § 2244(d) (2) provides that "[the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section."

The "grace period" adopted by this court began to run on April 24, 1996. Upon application of the tolling provision

contained in 28 U.S.C. § 2244(d)(2), the court finds that the limitation period was tolled after the expiration of 180 days upon the filing of petitioner's Rule 32 petition on October 22, 1996 and remained tolled until the trial court denied the petition on April 8, 1998. Thus, as of April 8, 1998, the petitioner had 185 days of the applicable limitation period remaining within which to timely file a federal habeas petition.

Although Pace attempted to file an appeal of the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals determined that the notice of appeal was untimely and dismissed the case. An application for post-conviction relief "is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 364 (2000). "These [applicable rules] prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." Id. Upon review of the Alabama Court of Criminal Appeals dismissal of the appeal of his Rule 32 petition on the grounds that the petitioner did not comply with a state procedural rule governing filings, it appears that under the *Artuz* standard the state appellate court did not consider the petition properly filed. For purposes of this case, this court will defer to the state court's ruling. Thus, the time during which the petitioner's appeal of the denial of his Rule 32 petition remained pending in the Alabama Court of Criminal Appeals did not toll the limitations period.

As previously noted, 180 days of the "grace period" ran prior to Pace filing his Rule 32 petition. An additional 185 days of the limitation period ran prior to the filing of the

instant § 2254 petition. Thus, the limitations period expired on October 12, 1998.

The petitioner asserts that the limitations period should be tolled during the pendency of his application for a writ of certiorari challenging the dismissal of his post-conviction appeal. Although Pace filed an application for a writ of certiorari on June 10, 1999, this application did not toll the one-year period of limitation as the application was filed after this period had expired. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th. Cir. 2000). Consequently, the time allowed Pace for the filing of a federal habeas petition expired on October 12, 1998.

In light of the foregoing, the court concludes that the "grace period" expired in October of 1998. The court further finds that there is nothing before this court to indicate the existence of "extraordinary circumstances" which warrant an equitable tolling of the "grace period" until the date on which the petitioner filed this federal habeas corpus action. *Sandvik*, 177 F.3d at 1271.

The instant habeas petition was filed on September 2, 1999. Under the circumstances of this case as outlined herein, the court concludes that the reasonable time period afforded the petitioner under *Goodman* and *Wilcox* expired prior to petitioner's filing a § 2254 petition in this court. The court further concludes that the petitioner fails to show cause why his petition should not be dismissed.

CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

1. The petition for habeas corpus relief be denied as it was not filed within the one-year period of limitations contained in 28 U.S.C. § 2244(4)(1);

2. This case be dismissed with prejudice; and

3. The costs of this proceeding be taxed against the petitioner.

Done this 7th day of August, 2001.

VANZETTA PENN McPHERSON

VANZETTA PENN McPHERSON

UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 99-D-962-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except

upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See* also *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. day of August, 2001.

Done this 7th day of August, 2001.

VANZETTA PENN McPHERSON

VANZETTA PENN McPHERSON

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

[FILED AUG 22, 2001
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LEVI PACE, PETITIONER,	)	
V.	)	CIVIL ACTION
MICHAEL HALEY, ETC.	)	NO. 99-D-962-N
RESPONDENT	)	

ORDER

This cause is now presented to the court on the Recommendation of the Magistrate Judge, filed August 7, 2001, and petitioner's objections, filed August 17, 2001.

It is CONSIDERED and ORDERED as follows:

1. That petitioner's objections be and the same are hereby OVERRULED;

2. That the Recommendation of the Magistrate Judge be and the same is hereby ADOPTED, APPROVED and AFFIRMED;

3. That the petition for habeas corpus relief be and the same is hereby DENIED as it was not filed within the one-year period of limitation contained in 28 U.S.C. 5 2244(d)(1);

4. That this case be and the same is hereby DISMISSED with prejudice; and

5. That costs of this proceed[ing] be taxed against the petitioner for which let execution issue.

DONE this the 22nd. Day of August, 2001.

IRA DEMENT

UNITED STATES
DISTRICT JUDGE

APPENDIX D

WESTLAW REPORT OF DECISION
AND DENIAL OF REHEARING

(Cite as: 49 Fed.Appx. 287, 2002 WL 31174135
(11th Cir. (Ala.)))

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion. Eleventh Circuit Rules, Rule 36-2, 28 U.S.C.A.)

United States Court of Appeals, Eleventh Circuit.

Levi Pace v. Charlie E. Jones

NO. 01-15528

September 17, 2002

Appeal From: M.D.Ala., No. 99-00962-CV-D-N

Reversed in part, Vacated in part.

History

(Showing 2 documents)

Direct History

H 1 Pace v. Jones, 49 Fed.Appx. 287, ___ F.3d ___, 2002 WL 31174135 (11th Cir.(Ala.) Sep 17, 2002) (TABLE, NO. 01-15528)

Rehearing and Rehearing en banc Denied by

→*Pace v. Jones*, ___ F.3d ___, 2002 WL 31652311 (11th Cir. (Ala.) Nov 08, 2002) (TABLE, NO. 01-15528) (TEXT NOT AVAILABLE ON WESTLAW)

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APPENDIX E

United States Court of Appeals

For the Eleventh Circuit

No. 01-15528

[FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

Sep 17, 1002 [sic]

THOMAS K. KAHN

CLERK]

District Court Docket

No. 99-00962-CV-D-N

LEVI PACE,

Petitioner-Appellant,

versus

CHARLIE E. JONES, Warden,

WILLIAM H. PRYOR, JR.,

Attorney General for the State of Alabama,
MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections,

Respondents-Appellees.

Appeal from the United States District Court

for the Middle District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 17, 2002

For the Court: Thomas K. Kahn, Clerk

By: Meoli, Anthony

[ISSUED AS MANDATE
NOV 18, 2002 U.S. COURT OF APPEALS
ATLANTA, GA.
NOV 18 2002]

APPENDIX F

[FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 1 9 2002]
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15528

LEVI PACE,

Petitioner-Appellant,

Versus

CHARLIE E. JONES, Warden,
WILLIAM H. PRYOR, JR.,
Attorney General for the State of Alabama, ET AL.,

Respondents-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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ORDER:

Appellees' "Motion to Withdraw and Stay the Mandate," construed as a motion to recall the mandate pending

disposition of Appellees' planned petition for certiorari, is DENIED.

FRANCIS M. HULL

UNITED STATES
CIRCUIT JUDGE

DOCUMENT NUMBER 89570

APPENDIX G

NO. 01-15528-DD

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

LEVI PACE, APPELLANT,

VS.

CHARLIE E. JONES, WARDEN, ET AL, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

(DISTRICT COURT NO. 99-D-962-N)

PETITION FOR REHEARING AND SUGGESTION OF EN BANC CONSIDERATION OF APPELLEE

STATEMENT UNDER RULE 35(B)(1), FRAP

The panel decision in this case conflicts with the decisions of the United States Court of Appeals for the Eleventh Circuit in *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002); *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310 (11th Cir. 2001); *cert. denied sub nom Helton v. Moore*, 122 S. Ct. 1965 (2002), and *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999). The panel decision also conflicts with the decision of the United States Supreme Court in *Carey v. Saffold*, 122 S. Ct. 2134 (2002). Consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

APPELLEES' PETITION FOR REHEARING

The appellees petition this Court for rehearing of the panel decision and opinion rendered on September 17, 2002, and as grounds for this petition submit the following:

1. This is an appeal from the dismissal of the habeas corpus petition filed on behalf of Pace, a state prisoner, on the grounds that the petition was barred by the statute of limitations.

2. The District Court's ruling was based on the fact that Pace's attorneys mailed the notice of appeal of the denial of state post-conviction relief from Atlanta by regular mail on May 15, 1998, five days before it was due, and the notice did not reach the state court in Clanton, Alabama, until May 21, 1998, one day after it was due.

3. It is undisputed that, on or prior to May 20, 1998, the last day for a timely filing, Pace's attorneys made no inquiry of the state court clerk's office about whether the notice of appeal had been received.

4. On March 26, 1999, the Court of Criminal Appeals of Alabama dismissed Pace's appeal, because his notice of appeal was not timely. The Court stated: " . . . If a notice of appeal is untimely, the case is due to be dismissed because we lack jurisdiction. . . . " (Doc. 7, Respondents' Exhibit "A".)

5. The action of the Court of Criminal Appeals of Alabama was in accordance with uniformly applied Alabama law.

6. The United States District Court for the Middle District of Alabama ruled that, because the notice of

appeal of the denial of state post-conviction relief was untimely filed by Pace's attorneys, it did not toll the statute of limitations on a federal habeas corpus petition by Pace. Therefore, the statute of limitations ran on October 12, 1998, almost a year before Pace filed his federal habeas corpus petition on September 2, 1999.

7. On September 17, 2002, a panel of this Court reversed and vacated the judgment of the district court and remanded the case, holding that, although the notice of appeal of the denial of state post-conviction relief was untimely filed by Pace's attorneys, the statute of limitations on a federal habeas corpus petition by Pace was equitably tolled. (Manuscript Opinion pages 16-19) The panel based this ruling on the following:

(a). A number of documents in the state court record, that were created after the filing of the tardy notice of appeal, recite a variety of dates for the filing of the notice of appeal; the record contains no evidence as to where the persons who created these documents got their information as to the date of the filing of the notice of appeal;

(b). The panel's determination that Pace's attorneys had every reason to believe that their notice of appeal was timely, although they never inquired about its timeliness;

(c). The panel's determination that Pace's attorneys acted with due diligence, although the record is clear that they took no action relative to the notice of appeal except to mail it by regular mail five days before it was due.

8. In holding that Pace's attorneys acted with due diligence in mailing the notice of appeal by regular mail five days before it was due, the panel's decision and opinion in this case conflicts with the decision and opinion

in *Sandvick v. United States*, 177 F.3d 169 (11th Cir. 1999), in which this Court held that an attorney's mailing a document less than a week, i.e. six days, before it was due did not constitute due diligence, when the document did not arrive by the due date.

9. In holding that Pace's attorneys acted with due diligence, although they never inquired about whether the notice of appeal had arrived on time, the panel's decision and opinion in this case conflicts with the decision and opinion in *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002), in which this Court held that a pro se inmate did not act with due diligence when he failed to ascertain the status of his petition.

10. In holding that the statute of limitations was equitably tolled in this case, the panel's decision and opinion in this case conflicts with the decision and opinion in *Helton v. Secretary for the Department of Corrections,* 259 F.3d. 1310 (11th Cir, 2001), *cert. denied sub nom Helton v. Moore*, 122 S. Ct. 1965 (2002), in which this Court reversed a district court's application of equitable tolling to the petition of a pro se convict on the grounds that the convict was diligent, misled by his attorney as to the filing deadline, and had an inadequate prison law library. This Court held that none of the factors found by the district court authorized equitable tolling of the statute of limitations.

11. In holding that the statute of limitations was equitably tolled in this case, the panel's decision and opinion conflicts with the decisions and opinions in every case from every circuit on the subject of equitable tolling of the statute of limitations. E.g. *Dunlap v. United States*, 250 F.3d 1001 (6th Cir.); cert. denied 122 S. Ct. 649 (2001).

12. On another point, the panel ruled that, although Pace's attorneys did not file a timely notice of appeal, the statute of limitations was tolled during the time during which they could have filed a timely notice of appeal. (Manuscript Opinion pages 9-11) This holding conflicts with the recent opinion and decision of the United States Supreme Court in *Carey v. Saffold*, 122 S. Ct 2134 (2002). In that case, Saffold, a convict proceeding pro se, had a "reasonable time" to file a petition in the California Supreme Court. He waited 4 1/2 months before filing his petition in the California Supreme Court, and the California Supreme Court denied Saffold's petition, "on the merits and for lack of diligence". 122 S. Ct. at 2137. The issue before the United States Supreme Court was whether the statute of limitations on a federal habeas corpus petition was tolled during the 4 1/2 months Saffold delayed before filing his petition in the California Supreme Court. The United States Supreme Court recognized that the statute of limitations was tolled during that period only if Saffold's ultimate filing was reasonable, i.e. timely. For example: " . . . It remains to ask whether Saffold delayed "unreasonably" in seeking California Supreme Court review. If so, his application would no longer have been "pending" during this period. . . . (122 S. Ct at 2141; emphasis supplied.) The Court stated: " . . . If the California Supreme Court had clearly ruled that Saffold's 4 1/2 – month delay was 'unreasonable', that would be the end of the matter. . . . " 122 S. Ct. at 2141. This proposition is also demonstrated by the United States Supreme Court's ultimate disposition of the case: They remanded the case for a determination of whether the 4 1/2 month delay was reasonable. The United States Supreme Court's opinion in *Carey v. Saffold* makes sense only if a state post-conviction proceeding is considered pending during the time an

appeal could be filed, if, and only if, a timely appeal is actually filed.

SUGGESTION OF REHEARING EN BANC

As pointed out above, the panel decision in this case conflicts with the decision and opinion of the United States Supreme Court in *Carey v. Saffold*, 122 S. Ct. 2134 (2002) and the decisions and opinion of the United States Court of Appeals for the Eleventh Circuit in *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002); *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310 (11th Cir. 2001); *cert. denied sub nom Helton v. Moore*, 122 S. Ct. 1965 (2002), and *Sandvik v. United States,* 177 F.3d 1269 (11th Cir. 1999) Therefore, the appellees suggest that, if the panel is not inclined to grant rehearing, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

CONCLUSION

In conclusion, the appellees ask this Court to grant rehearing in this case for the reasons stated herein.

Respectfully submitted,

William H. Pryor Jr.

PRY002

Alabama Attorney General

Nathan A. Forrester

Solicitor General,

BY:

Joseph G. L. Marston, III

Joseph G. L. Marston, III

MAR032

Alabama Assistant
Attorney General

ATTORNEYS FOR
THE APPELLEES

Joseph G. L. Marston, III

MAR032

Alabama Assistant
Attorney General